

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,)	CASE NO. 8:07CR145
)	
Plaintiff,)	
)	
vs.)	TENTATIVE FINDINGS
)	AND ORDER
)	
NATHANIEL CYPRIAN,)	
)	
Defendant.)	

This matter is before the Court on the following pleadings filed by the Defendant, Nathaniel Cyprian: motion to continue sentencing (Filing No. 35); motion for issuance of a subpoena duces tecum, filed as a motion to continue (Filing No. 36); proposed order for issuance of a subpoena duces tecum, filed as a motion to continue (Filing No. 37); motion for downward departure or variance, filed as a motion to continue (Filing No. 38); affidavit in support of motion for issuance of a subpoena duces tecum, filed as a motion to continue (Filing No. 39); motion for issuance of a subpoena duces tecum in forma pauperis (Filing No. 40); motion to continue sentencing (Filing No. 42); and motion for downward departure or variance (Filing No. 43).

Initially, the Court notes that these Tentative Findings are issued previous to the date listed in ¶ 6 of the Order on Sentencing Schedule (Filing No. 20.) However, because the Defendant's submissions appear to be complete and due to the issues raised by the filing of the pleadings and the substance of the pleadings, the Court advanced the date of the filing of the Tentative Findings. If a party is inconvenienced by the alteration of the date listed in ¶ 6, the Court will address future filings either by issuing amended tentative findings or at sentencing.

Technical Issues/Filing

First, the Court addresses the manner in which the documents at issue were filed. Five of the filings were filed on the Court's ECF system as motions to continue (Filing Nos. 35, 36, 37, 38, 39), when in fact only one of those pleadings (Filing No. 35) is a motion to continue. The Court suggests that defense counsel and, if relevant, his office staff, refer to the extensive training available with respect to filing on the ECF system, see <http://www.ned.uscourts.gov/cmecf/> and <http://www.ned.uscourts.gov/localrules/>.¹

Also, one document filed as a motion to continue is a proposed order for issuance of a subpoena duces tecum, filed as a motion to continue (Filing No. 37). Proposed orders must not be filed on the ECF system, but rather e-mailed to the chambers address which, in the case of the undersigned judge, is smithcamp@ned.uscourts.gov.

The documents that are motions or objections are discussed with accordingly below. The remaining filings (Filing Nos. 37, 39) are not motions or objections and will be stricken.

Also, defense counsel is advised that it is a policy of the probation office that counsel may view at the court records assembled by the probation officer.

Substantive Issues

Looking at all of the pleadings and documents together, it appears that the Defendant's goal is to object to ¶¶ 37 (career offender status) and 43 (predicate conviction) of the PSR. (Filing No. 41.)² Once a defendant objects to his alleged career offender

¹On the latter site, click on "Criminal Administrative Procedures."

²The document at Filing No. 41 is captioned as an "Affidavit in Support of Motion for Issuance of a Subpoena Duces Tecum In Forma Pauperis." The document is considered as the Defendant's objection to the PSR.

status and the fact of an alleged predicate conviction, the burden is on the government to prove the facts supporting the career offender enhancement by a preponderance of the evidence. *United States v. Sun Bear*, 307 F.3d 747, 751 (8th Cir. 2002). Therefore, because it is not the Defendant's burden to prove the issues raised, the following motions filed by the Defendant are denied: motion to continue sentencing (Filing No. 35); motion for issuance of subpoena duces tecum (Filing No. 36); motion for issuance of subpoena duces tecum in forma pauperis (Filing No. 40); and motion to continue sentencing (Filing No. 42).

The Defendant's motions for downward departure or variance (Filing Nos. 38, 43) are denied because the motion fails to state the reason for the suggested departure or variance. To the extent that the suggested grounds is the issue relating to the Defendant's alleged career offender status, that issue is properly raised as an objection to the PSR.

IT IS ORDERED:

1. The following motions, filed by the Defendant, Nathaniel Cyprian, are denied: motion to continue sentencing (Filing No. 35); motion for issuance of a subpoena duces tecum, filed as a motion to continue (Filing No. 36); motion for downward departure or variance, filed as a motion to continue (Filing No. 38); motion for issuance of a subpoena duces tecum in forma pauperis (Filing No. 40); motion to continue sentencing (Filing No. 42); motion for downward departure or variance (Filing No. 43)
2. The Clerk is directed to strike the following documents: proposed order for issuance of a subpoena duces tecum, filed as a motion to continue (Filing

No. 37); affidavit in support of motion for issuance of a subpoena duces
tecum filed as a motion to continue (Filing No. 39)

DATED this 17th day of October, 2007.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge